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In The

Supreme Court of the United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT, JOHNSON CONTROLS, INC.

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation and New England Legal Foundation respectfully submit this brief amicus curiae in support of respondent. Consent to the filing of this brief has been granted by counsel for all parties.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

The New England Legal Foundation is a nonprofit public interest law firm incorporated in Massachusetts and dedicated to furthering the goals of free enterprise, protection of personal and property rights, and maintenance of limited, balanced, and rational government regulation of private conduct. The Foundation's litigation strategy is set by its Legal Review Committee which is composed of attorneys employed by major New England corporations and private law firms. The Committee reviews proposed litigation to determine whether it is consistent with the Foundation's goals and in the public interest. That Committee has approved the filing of this amicus brief.

Amici believe that their public policy perspective will assist the Court in its review of this case. Specifically, amici will argue that Title VII does not prohibit legitimate, scientifically based programs to promote reproductive health.

INTRODUCTION

By all accounts, this is an odd case. At issue is an employer's program to promote human health and safety. This employer began protecting its employees before the federal government imposed this protection through the Occupational Safety and Health Act. This employer continues to provide its employees with a safer workplace than the law commands.

The policy at issue in this case is based on valid scientific evidence. This policy is designed to protect the children of the employer's female employees. There is no dispute in this case that the danger to these children is real. A significant body of scientific evidence counsels that the danger, in this case, is caused by exposure of the mother and not the father.

This policy protects against lead poisoning—an environmental risk long recognized as the cause of irreparable learning disabilities and retardation. There is no dispute about this, just as there is no dispute that lead poisoning could cause permanent brain damage to the impacted child. All this notwithstanding, the issue before this Court is whether the employer is required to put aside concerns about its employees' children's health. Indeed, the issue is whether the employer who fails to put these concerns aside has violated federal law. In the absence of clear congressional intent to the contrary, amici urge the rejection of legal theories that would put children at such risk.

SUMMARY OF ARGUMENT

This Court should proceed from the premise that Congress, in enacting Title VII, did not intend to prohibit employers from acting to protect the health of their employees' children. None of the existing modes of analysis, however, take this interest in protecting reproductive health into account. Disparate impact analysis is inappropriate in this case because the policy at issue is not "facially neutral." Given the biological dichotomy between the roles of the sexes in reproduction, policies relating to reproductive health will almost always be directed at either male or female employees exclusively.

In enacting Title VII, Congress recognized this biological dichotomy. This recognition is embodied in the bona fide occupational qualification (BFOQ) exception to the prohibition on gender discrimination. In light of this Court's admonition that the BFOQ exception is extremely narrow, that exception may not be suited for this type of case. Although, there is no question that women can physically perform the jobs in question that performance would be at a socially unacceptable cost.

Amici believe the best way to analyze this case is to recognize, as the Equal Employment Opportunity Commission (EEOC) has, that the reproductive health cases are a class unto themselves. The Court should allow the employer, as an affirmative defense to a prima facie case of sex discrimination, to prove a business justification for the reproductive health policy. The employer's burden would be to establish a sound scientific basis for the policy. The claimant could rebut the employer's case, however, by demonstrating the existence of a reasonable,

less discriminatory alternative that would achieve the same goal of protecting reproductive health.

ARGUMENT

AN EMPLOYER MAY ACT TO PRESERVE HUMAN SAFETY WITHOUT VIOLATING TITLE VII OF THE CIVIL RIGHTS ACT

This case fits neatly into none of the traditional modes of analyzing Title VII claims. This lack of a fit is apparent from the diversity of opinion among the Courts of Appeals. The court below felt that both the disparate impact and the bona fide occupational qualification analysis were appropriate, notwithstanding their apparent mutual exclusivity. The Eleventh Circuit, in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1547-48 (11th Cir. 1984), considered arguments that such cases be treated as disparate treatment actions and analyzed under the burden shifting formula of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

While either of these modes of analysis can, perhaps, be "made to fit," amici urge the Court to follow the lead of the EEOC and to treat these cases involving fetal protection policies as a class unto themselves. Under the EEOC approach, the employer's policy is subjected to a test similar to the business justification analysis applied in disparate impact cases. This analysis provides the best protection against illicit discrimination while at the same time it provides employers the freedom to protect human safety. This would also allow time for Congress to decide

how it wishes to approach this subject without subjecting the employees' children to a demonstrable health risk in the interim.

I

TRADITIONAL TITLE VII ANALYSIS IS INAPPROPRIATE IN CASES CONCERNING PREVENTION OF REPRODUCTIVE HARM

As noted above, the Courts of Appeals have found ways to make cases such as this "fit" into one or more of the traditional modes of analysis. Each court has noted the analytic difficulties presented by these cases. This conclusion that there are analytical difficulties in these cases, however, rests upon the assumption that it is rational for an employer to act upon scientific evidence of potential reproductive harm and the further assumption that Congress did not intend to prohibit such action.[1] Thus, the lack of a "fit" in the traditional analyses is their apparent inability to take into account the employer's interest in preventing reproductive harm.

A. Disparate Treatment—Pretext Cases

There are two modes of analyzing discrimination claims that are based on a charge of disparate treatment

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[1] Throughout this argument, amici presume that the court below correctly found the existence of scientific evidence to back the employer's claims that the reproductive harm at issue derives exclusively from the mother and that the harm can take place before the woman knows that she is pregnant. *See* Joint Appendix at 5-9, 15-16, 148-50, 167, 198-99, 240. These scientific issues would, of course, need to be established by the employer in defending against sex discrimination claims.

or intentional discrimination. The first challenges discriminatory conduct that is masked by pretextual explanations. The second involves admitted discrimination that is claimed to be a bona fide occupational qualification.

In pretext cases, this Court has recognized that there will be problems of proof in establishing that an employer has engaged in intentional discrimination. Thus, in *McDonnell Douglas* this Court established a procedure whereby the claimant could establish a prima facie case by showing that the adverse employment decision was based, more likely than not, on illicit discrimination. Once that was established, the employer was required to come forward with legitimate, nondiscriminatory reasons for the decisions. The claimant then had the opportunity to show that the reasons given were merely a pretext for unlawful discrimination. *McDonnell Douglas v. Green*, 411 U.S. at 802-03; *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 575-78 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-56.

At first blush, this burden shifting formula appears to be well-suited for cases such as this. During the course of trial, the employer would be permitted to produce the scientific evidence claimed to support the policy, and the employee would be permitted an opportunity to rebut that evidence. The problem lies, however, in the first step of the analysis. This line of analysis was developed for those cases where the discrimination was intentional, but hidden. The discrimination in this case is not hidden, however. The employer's policy is very explicit: fertile women will not be hired for positions where the level of

airborne lead poses significant reproductive harm. Further, the employer would not be able to rebut the argument that the claimant was not hired because of her gender. Instead, the employer could only show that there was a "good reason" for disqualifying the claimant on the basis of sex—a defense apparently not allowed under *McDonnell Douglas*. Thus, the "pretext" analysis does not assist in deciding claims that the employer is acting to protect against reproductive harm. *Hayes*, 726 F.2d at 1547-48; *see also City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978).

B. Bona Fide Occupational Qualification

The second type of disparate treatment case involves employer conduct that admittedly treats employees differently on the basis of gender. The employer argues that such discrimination is lawful, however, as a "bona fide occupational qualification."

This Court has ruled that the bona fide occupational qualification exception to Title VII's prohibition of gender discrimination is "extremely narrow." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). In *Dothard*, this Court cited, with apparent approval, lower court decisions to the effect that the bona fide occupational qualification defense applies only " 'when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.' " *Id.* at 333 (quoting *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (emphasis in original)).

Dothard rejects the notion that employers could bar women from employment for their own safety. Instead,

this Court ruled "that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335. Nor can the employer rely on preconceived notions of a woman's relative abilities. Instead, the employer must show "[t]he employee's very womanhood would . . . directly undermine her capacity" to perform the job in question. *Id.* at 336.

The court below adopted the bona fide occupational qualification defense as a secondary basis for upholding the employer's policy of preventing reproductive harm. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 893 (7th Cir. 1989). That court ruled that industrial safety "is legitimately part of the 'essence' of the 'business' of a battery manufacturing enterprise." *Id.* at 896. While this does accomplish the purpose of moving the case to the stage where the employer would be put to its scientific proof, it does not appear to address this Court's concern that the bona fide occupational qualification exception is extremely narrow. *Dothard*, 433 U.S. at 334. The analysis employed below goes beyond the central question in traditional BFOQ cases, namely whether the disqualified class is, in fact, unable to perform the job merely on the basis of their membership in the class. Here, fertile women could perform the job, but at a socially unacceptable cost. The court below proposes to take this cost into account in the context of a BFOQ analysis. Amici believe that the analysis originally proposed by the EEOC addresses all of these concerns. *See* Part II, *infra*.

C. Disparate Impact/Business Justification

The primary basis for the holding in the court below was the business justification defense. This defense has

traditionally been applied in cases where the claim is one of disparate impact, rather than disparate treatment. In such cases, the claimant need not establish intentional discrimination. Instead, the claimant points to a particular employment practice that, while facially neutral, disproportionately impacts a particular class. The employer may survive the claim by establishing that the challenged practice is supported by a "business justification." Even then, the claimant will prevail if she can demonstrate the availability of alternate means to achieve that business purpose with a less discriminatory impact. *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L. Ed. 2d 733, 751-52 (1989).

To establish a business justification the employer must demonstrate that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 752. The practice need not be essential to the business, but at the same time it must be more than a mere insubstantial justification. *Id.* at 752-53.

This is essentially the analysis adopted by the court below, the Fourth Circuit in *Wright v. Olin Corporation*, 697 F.2d 1172 (4th Cir. 1982), and the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*. The decisions of the Fourth and Eleventh Circuits are notable for their verbal gymnastics in attempting to characterize cases such as this as involving "facially neutral" policies. *Wright*, 697 F.2d at 1186; *Hayes*, 726 F.2d at 1552.[2] In *Wright*, the

[2] The court below apparently dispensed with this element of the analysis altogether, as does the EEOC.

court noted that the issue of facial neutrality was subject to logical dispute, but brushed that dispute aside as "mere semantic quibbling." *Wright*, 697 F.2d at 1186. The *Hayes* court fared no better in its attempt to explain neutrality:

> "If an employer proves that a policy applying only to women or pregnant women employees is justified on a scientific basis and is not necessary to protect the offspring of male employees, the employer has shown that its policy is neutral, in the sense that it equally protects the offspring of all employees." *Hayes*, 726 F.2d at 1552.

But in both cases, and this case as well, the policies at issue were not "facially neutral" as that term is understood in usage. Indeed, given the biological dichotomy between the roles of the sexes in reproduction, policies relating to reproductive health will almost always be directed either at male or female employees exclusively. Of course, if the policy in fact applied to fertile employees of either sex, no claim of discrimination would exist since the employees of either gender would be treated equally.

II

THIS COURT SHOULD ADOPT THE EEOC BUSINESS JUSTIFICATION APPROACH

Although the business justification analysis was not originally designed for cases involving "overt" discrimination, it provides the best framework for testing the claims of the employer. As demonstrated below, the business justification analysis promotes the dual goals of

preventing illicit discrimination and allowing employers to implement scientifically justified policies protective of reproductive health.

If the Court adopts the view that Congress did not intend to prohibit employers from protecting children from workplace hazards, as amici believe the Court should, then both of the above modes of analysis fall short of reaching this goal. This is why the EEOC has recognized that reproductive health cases are "a class unto themselves." Policy Statement on Reproductive and Fetal Hazards Under Title VII n.11 (reprinted in Fair Empl. Prac. Manual (BNA) 405:6613, 6615).[3] Amici believe that the EEOC, and the court below, have developed the appropriate analytical framework for such cases and we urge the Court to adopt that framework.

Under the EEOC framework, once a claimant makes out a prima facie case of sex discrimination, the employer must demonstrate that the policy is based on the potential for substantial risk, documented by scientific evidence, where the risk is not shared by both sexes. Even then, the claimant may rebut that case with evidence that a reasonable, less discriminatory alternative exists. *Id.* at 6617-18.

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[3] The EEOC has since relabeled its analysis as one involving the bona fide occupational qualification defense. The purpose of the new label is to ensure that the employer retains the burden of proof. EEOC, Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.*, ___ F.2d ___, 51 EPD ¶ 39,359 (7th Cir. 1989) (Jan. 24, 1990). Amici address this problem at Pages 13-15, *infra*, without resorting to a simple "relabeling" of the analysis.

Amici believe that this framework serves the dual role of protecting reproductive health and preventing illicit discrimination. Employers are free to adopt reproductive health programs only when they can demonstrate a scientific basis to do so. Employers who adopt such programs as a pretext for discrimination or on the basis of "romantic paternalism" will not survive the scrutiny called for by the EEOC. Not only must the employer demonstrate with scientific evidence that a significant risk of harm exists, the employer must also show that risk is not shared by both sexes.

Finally, the claimant could still argue for alternative practices that do not carry the same discriminatory impact. Such practices could include feasible means for removing the contaminant from the workplace or otherwise effectively protecting all workers from exposure. If the policy impacts only on women, it may be that the danger does not exist for the first several months of pregnancy, thus, allowing women to perform the jobs in question and take a leave of absence, or temporarily transfer to another job on discovery of the pregnancy.

The final issue that remains involves allocation of the burden of proof. The court below, viewing this as a case involving the business necessity defense to a disparate impact claim, applied this Court's recent ruling in *Wards Cove*. In that decision, this Court held that the burden of persuasion remains at all times with the plaintiffs, and the only burden shifted to the employer is to produce evidence of a business justification. *Wards Cove*, 104 L. Ed. 2d at 753. In the decisions prior to *Wards Cove*, the

Eleventh and Fourth Circuits placed the burden of persuasion on the employer to establish the scientific validity of the reproductive health policy. *Hayes*, 726 F.2d at 1552; *Wright*, 697 F.2d at 1190. The EEOC does not address this question in its policy statement.

In this instance, we think that the Court should recognize reproductive safety policies as an *affirmative defense* to a charge of discrimination. This would require the employer to carry the burden of persuasion on the scientific validity of the policy, but would leave the claimant the burden of establishing all other elements of the case, such as the existence of less discriminatory alternatives. We believe that this departure from the formulation in *Wards Cove* is justified by the differences in the types of cases.

In *Wards Cove* the employer is being charged with discrimination simply on the basis of statistics. Faced with this charge of inferential discrimination, the employer can be required to rebut the charge by establishing a business justification for the challenged practice. If the employer was required to bear the burden of proving the negative proposition of nondiscrimination, however, it would lead to a nearly impossible situation in which employers would be forced to choose between unjustified Title VII liability and the imposition of strict quotas. *See Wards Cove*, 104 L. Ed. 2d at 749.

These same policies are not present in this case. This is not a case of inferential discrimination or disparate impact. The employer is not required to prove a negative. Instead, the employer has chosen to treat job applicants differently based on scientific evidence of the potential

for reproductive harm. Since the employer must develop a substantial body of evidence to justify such a practice under the EEOC policy, requiring the employer to carry the burden of persuasion on this one element would not be unfair.

CONCLUSION

Amici urge this Court to allow employers to choose to protect against reproductive injury. The policies of Title VII will still be vindicated by requiring the employer to come forward with evidence that the policy is scientifically based, and the substantial risk to reproductive health is carried only by one sex. Title VII should not be interpreted to bar policies that protect the health of children.

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Respectfully submitted,

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